

SUBMISSIONS

REVIEW OF THE AB DISPUTE RESOLUTION SYSTEM

CANADIAN DEFENCE LAWYERS

MEDIATION

The implementation of mandatory mediation in respect of civil actions and the subsequent use of mediation in other areas of the province where it is not mandatory, has shown that there is great utility in the process. Early statistics evaluating the Ontario Mandatory Mediation Program showed that over 50% of cases settled completely or at least some of the issues. From that perspective it is a process which is worth preserving.

However in order for mediation to have utility it must be conducted at the proper time during the dispute. This would entail, amongst other things, proper exchange of productions and expert opinions. Although it is unknown whether statistics support this, it would appear that with the development of detailed, well reasoned and researched briefs the incidents of settlement of tort claims increased. In addition, one would also expect that being brought face to face, without the ability to opt out from attending, brings another dynamic into the settlement pot, which appears to assist in resolving matters. Having the parties present to provide additional information to fill in those unknown facts allows the parties to make a more informed decision but also offers the opportunity for the mediator to best utilize his or her skills in attempting to move the settlement discussion forward.

As such in the AB world, the factors such as documentary exchange and experts reports are not the stumbling block in terms of proper timing of the mediation as the process allows for this to occur prior to mediation. However some of the other processes are noticeably absent and the following are a list of suggestions the CDL would ask to be considered:

What issues to be Mediated

1. Make mediation mandatory for all disputes unless it is in a listed category of exemptions. One such exemptions should be a CAT determination as it is a determination which does not lend itself to settlement through any form of compromise;

When Mediation to Take Place – As a prerequisite to an arbitration/court proceeding or later

2. There are certain disputes which lend themselves to an early resolution or certain disputes which benefit more significantly from early resolution and these can be identified by way of a list and be subject to mediation prior to commencing an arbitration or action. For example, MIG issues.

3. All other disputes not identified on the list should be required to hold a mediation prior to an adjudication hearing but not prior to commencing the adjudication process. Like the tort system, the parties can then set a mutually convenient date and time when the claim is in a better position to be resolved. This could assist in two ways in that it spreads out the demand for mediation hopefully reducing the backlog but as well allows for the process to proceed when the time is more ripe for settlement.

The Process Itself

4. Mandatory provision of proper detailed mediation briefs setting out the position of each party with appropriate references to the supporting documentation for the position.
5. Timelines for which these briefs have to be submitted and exchanged so as to allow for the claimant and the insurer to have time to consider the contents.
6. That the process be done face to face (which would require FSCO mediators to be located in areas throughout the province or be required to travel or alternatively allow a prevetted roster of non FSCO mediators to be utilized in other areas of the province as was done to address the backlog). Alternatively video conferencing could be utilized.
7. Make it mandatory that all parties must attend the mediation in person.

APPLICATION FORM

Often the claimant has been involved in a previous motor vehicle accident for which they may still be getting treatment or claiming benefits. Often this information does not become apparent until medical or rehabilitation records are produced. This is information which would be useful for the insurer from the onset and could serve to avoid duplicity in assessments and could assist in making determinations regarding the MIG.

Proposed that the Application be amended to include a section identifying the dates of any motor vehicle accidents in the previous five years with the particulars of the AB insurer.